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No. 07-(1)

Supreme Court, U.S.
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In The
# Supreme Court of the United States

ROGER BLAKE, M.D.,

*Petitioner,*

v.

THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER, DR. DANIEL JONES, IN HIS OFFICIAL CAPACITY AS CHANCELLOR OF THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER, JAMES ROY KLUMB, ED BLAKESLEE, THOMAS W. COLBERT, DR. RICHARD A. CROFTS, DR. L. STACY DAVIDSON, JR., DR. D. E. MAGEE, JR., DR. BETTYE HENDERSON NEELY, VIRGINIA SHANTEAU NEWTON, BOB OWENS, AUBREY PATTERSON, ROBIN ROBINSON, SCOTT ROSS, AMY WHITTEN, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING AND PAUL TRUSSELL, INDIVIDUALLY AND AS DIRECTOR OF HUMAN RESOURCES OF THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

DENNIS L. HORN
*Counsel of Record*
SHIRLEY PAYNE
HORN & PAYNE, PLLC
Post Office Box 2754
Madison, Mississippi 39130
(601) 853-6090

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

Should this Court grant certiorari to resolve the ten-to-three circuit conflict, and the eighteen-to-one-to-thirty-one split in the state courts, over whether lie detector tests can be admitted into evidence without an evidentiary foundation for the truth of their assertions under a harmless error standard?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Roger Blake, M.D., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished, but appears at Pet. App. 1-4. The district court's order granting summary judgment in favor of respondents (Pet. App. 5-38), dated March 28, 2006, is unpublished.

## JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on August 2, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISION

Federal Rule of Evidence 103(a): "Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."

## STATEMENT OF FACTS

The Petitioner, professor of surgery, Dr. Roger Blake, has alleged that polygraph evidence was impermissibly used against him to establish contested issues of fact on summary judgment, the termination of his state employment with the University of Mississippi Medical Center.

The United States District Court, in an opinion "essentially" adopted by the Fifth Circuit, App. 4, held that a polygraph examination given to Dr. Blake satisfied the notice and hearing requirements envisioned by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 547-48 (1985). Over competency, authentication, and hearsay objections, the District Court, as affirmed by the Court of Appeals, held that the results of the polygraph exam, unsworn by the polygraph examiner but offered by an affidavit from the head of the Hospital's Human Resources Department, were admissible and afforded sufficient basis for the Court to grant summary judgment against the doctor. App. 4-5, 18-19. No evidence was offered to authenticate the polygraph results, to overcome the doctor's hearsay objection, to qualify the polygraph examiner as an expert, or otherwise to support any claim that the results of the polygraph were scientifically accurate[1] The Fifth Circuit ruled that the

[1] Dr. Blake passed the lie detector test except as to one question, for which the examiner opined that "it is also the opinion of the examiner that counter measures were most likely

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admission of the polygraph as evidence for the truth of its assertions was harmless error. App. 4.

The University of Mississippi Medical Center fired surgeon and professor Dr. Roger Blake in the middle of a contract year. App. 8, 41-42. Dr. Blake's contract allowed for discharge only for malfeasance or contumacious conduct, giving him a property interest in his employment. App. 8, 22. *Bishop v. Wood*, 426 U.S. 341 (1976); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

Dr. Blake never learned what conduct was supposedly serving as the basis for his termination. App. 24. He was asked a multitude of questions about his relationship with a female urologist from whom he had obtained a consensual medical examination. App. 57.

After Dr. Blake was formally terminated, on advice of counsel, App. 10, 42-44, UMMC refused to afford him a due process hearing before an impartial decision-maker wherein Dr. Blake could confront adverse witnesses and evidence. Instead, Dr. Blake was offered a "grievance procedure," App. 42, 45-54, established for non-faculty employees to permit an exit interview with the officials who had already decided to terminate them. Dr. Blake was never given formal notice and a hearing, either pre-termination or

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employed to influence the exam." App. 10, 39-40. This opinion was never subject to cross-examination.

post-termination. His confrontation was only with the polygraph examiner.

Polygraph examinations are used with increasing frequency[2], and are being augmented with other devices such as voice stress analysis, thermal imaging, functional magnetic resonance imaging ("MRI"), or other neuroscience-based lie detection, while the scientific reliability of such tests remains, at best, dubious. See, *Neuroscience-Based Lie Detection: The Urgent Need for Regulation,* 2007 Boston University School of Law, 33 American Journal of Law and Medicine 377.

## REASONS FOR GRANTING THE WRIT

### I. THE COURTS OF APPEALS AND THE STATE COURTS ARE INTRACTABLY DIVIDED OVER THE QUESTION PRESENTED, WHETHER AND UNDER WHAT STANDARD TO ADMIT LIE DETECTOR EVIDENCE.

Prior decisions from this and other Courts have maintained the inadmissibility of lie detector tests, most notably, *U.S. v. Scheffer,* 523 U.S. 363 (1998). After *Daubert*[3], the courts have split on polygraph admissibility. Thirty-one states continue to exclude

[2] In Mississippi, a public employee's refusal to submit to a polygraph can result in termination. E.g., *Parks v. Miss. DOT*, 2007 U.S. App. LEXIS 20842 (5th Cir. Aug. 30, 2007).

[3] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

polygraph tests as evidence.[4] One state makes polygraphs admissible.[5] The remaining states admit polygraphs only on the stipulation of both parties.

The Fifth Circuit was the first federal court of appeals to hold that polygraph exams were to be admitted subject to *Daubert* analysis. *U.S. v. Posado*, 57 F.3d 428 (5th Cir. 1995). Other circuits differ. The Fourth Circuit, along with the District of Columbia and the military courts, maintains the *per se* inadmissibility of polygraphs.[6] The remaining circuits allow polygraphs to be admitted under a standard of judicial discretion, but with wildly differing results[7]

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[4] An overview including a map of the admissibility of polygraphs according to jurisdiction can be found at American Polygraph Association, *Quick Reference Guide to Polygraph Admissibility, available at http://www.polygraph.org* (last visited October 22, 2007).

[5] Only New Mexico generally permits the introduction of polygraph evidence without a stipulation. Rule 11-707 N.M.R.Ann.; *Lee v. Martinez*, 136 N.M. 166, 96 P.3d 291 (N.M. 2004).

[6] Fourth Circuit: *U.S. v. Marvel Johnson Prince-Oyibo,* 320 F.3d 494 (4th Cir. 2003) (It is well-established in this Circuit that polygraph examination results, or even the reference to the fact that a witness has taken a polygraph examination are not admissible.) District of Columbia: *U.S. v. Graham,* 83 F.3d 1466 (D.C. Cir. 1996), cert. denied, *Terrell v. U.S.*, 519 U.S. 1132 (1997) (The court declined to admit polygraph evidence under a *Brady* disclosure). Military Courts: *Sheffer, supra.*

[7] First Circuit: Compare *deVries v. St. Paul Fire and Marine Ins. Co.*, 716 F.2d 939, 945 (1st Cir. 1983) (holding that evidence of a witness's refusal to take a polygraph exam is inadmissible) with *U.S. v. Lynn*, 856 F.2d 430 (1st Cir. 1988) (trial court's discretion) with *U.S. v. Black*, 78 F.3d 1 (1st Cir. 1996) (polygraph

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examinations are generally inadmissible). Second Circuit: *U.S. v. Rea*, 958 F.2d 1206 (2nd Cir. 1992) (not *per se* inadmissible but not sufficiently reliable to be admissible); *U.S. v. Dwong*, 69 F.3d 663, 668 (2nd Cir. 1995) (the "legal Pandora's box" which the Fifth Circuit opened in *U.S. v. Posado* not yet agape in this circuit); but *U.S. v. Johnson*, 446 F.3d 272 (2nd Cir. 2006) (lie detector admissible on supervised release). Third Circuit: *Nawrocki v. Township of Coolbaugh*, 34 Fed. Appx. 832, 2002 WL 522738 (3rd Cir. 2002) (District Court did not abuse discretion in admitting polygraph for limited purpose of proving police chief had probable cause to arrest rather than for its truth that defendant was guilty of charges); *U.S. v. Zhang*, 1999 WL 61416 (D. N.J. 1999) (holding that even though the rule of *per se* exclusion of polygraph results is open to re-examination, no federal case has permitted the prosecutor to introduce polygraph evidence against the accused to show that the defendant was deceptive). Sixth Circuit: *Gurish v. McFaul*, 844 F.2d 789 (6th Cir. 1988) (Remand based on *Loudermill*, employer's argument that questions to be posed on polygraph would have sufficed for notice or hearing rejected.); *Conti v. C.I.R.*, 39 F.3d 658 (6th Cir. 1994), cert. denied, 514 U.S. 1082 (1995) (In the absence of a prior agreement between the parties that the results of a polygraph would be admissible, unilaterally obtained polygraph evidence is almost never admissible under F.R.E. 403). Seventh Circuit: *U.S. v. Lea*, 249 F.3d 632 (7th Cir. 2001) (polygraph excluded, proponent of polygraph evidence failed to establish its reliability). Eighth Circuit: *U.S. v. Greatwalker*, 356 F.3d 908 (8th Cir. 2004) (Because proponent never established or argued that polygraph results were reliable under *Daubert*, the polygraph results were inadmissible). Ninth Circuit: *Orr v. Bank of America*, NT & SA, 285 F.3d 764 (9th Cir. 2002) (Plaintiff offered document containing statements by a third party about Plaintiff's failing her polygraph examination, offered to prove the truth of the matter and is thus hearsay and inadmissible). Tenth Circuit: *Jones v. Geneva Pharms. Inc.*, 132 Fed. Appx. 772, 2005 U.S. App. LEXIS 9990 (10th Cir. 2005) (Plaintiff who had no intention of making the rigorous showing required under *Daubert* not permitted to testify as to her offer to take polygraph test). Eleventh Circuit: *Richardson v. Dougherty County, Ga.*,

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under, variously, Rules 103, 702 and 403 of the Federal Rules of Evidence.[8] The circuits are also split on whether polygraph examinations can be considered in post conviction matters[9], prison disciplinary hearings[10],

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185 Fed. Appx. 785, 2006 U.S. LEXIS 13836 (11th Cir. 2006) (Evidence that polygraph test used ruled admissible where not offered to prove the truth of the polygraph test results); *U.S. v. Piccionna*, 885 F.2d 1529 (11th Cir. 1989) (en banc) (Polygraph evidence not inadmissible *per se*, must meet three prerequisites); *U.S. v. Henderson*, 409 F.3d 1293 (11th Cir. 2005) (Notwithstanding *Piccionna*, polygraph evidence excluded for failure to satisfy *Daubert*).

[8] The results within the Fifth Circuit alone are unpredictable. Compare Dr. Blake's circumstances, along with cases admitting polygraph results as harmless error, e.g., *Hodges v. Mack Trucks, Inc.*, 474 F.3d 108 (5th Cir. 2006) with *Tittle v. Raines*, 231 F. Supp. 2d 537 (N.D. Tex. 2003), aff'd, 69 F.Appx. 658, 2003 U.S. App. LEXIS 12121 (5th Cir. 2003). In *Tittle*, the Fifth Circuit affirmed the exclusion of a polygraph test, finding it incompetent evidence on summary judgment because it could not meet all *Daubert* factors. In *Tittle*, as in many other cases, the court made its finding on *Daubert* without an actual review of the examiner's competency or the processes of the lie detector itself, but resorted instead to formulaic recitations from *Posado* or similar precedent which simply endorsed the result reached by the court. No testimony was heard and no *Daubert* proceedings were held.

[9] E.g., *U.S. v. York*, 357 F.3d 14 (1st Cir. 2004) (polygraph required for supervised release).

[10] *Kelley v. Rockett*, 1993 U.S. App. LEXIS 5311, aff'd, 989 F.2d 502 (7th Cir. 1993) (unpublished opinion) (Although polygraph tests are admissible in inmate disciplinary proceedings, inmate does not have a constitutional right to be given a polygraph test.)

sentencing hearings[11], or other administrative[12] or regulatory civil[13] matters.

## II. THE FIFTH CIRCUIT'S DECISION IS WRONG ON THE MERITS.

The Fifth Circuit ignored *Loudermill's* clear holding that a public employee with a contractual property interest in his employment is entitled to a hearing affording him notice of the charges, the evidence against him, an impartial decision-maker and right to confrontation. Instead, the results of a polygraph test were submitted to the federal district court as though the polygraph test had been an administrative hearing.

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[11] Compare *Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996), cert. denied, motion granted by *Wood v. Rupe*, 519 U.S. 1142 (1997) (court erred when it excluded polygraph evidence from capital sentencing proceedings) with *Goins v. Angelone*, 226 F.3d 312 (4th Cir. 2000) (polygraph evidence not required to be disclosed).

[12] *Petition of Grimm*, 138 N.H. 42, 635 A.2d 456 (N.H. 1993) (Doctor's favorable polygraph excluded from administrative hearing, court emphasized importance of credibility determination based on hearing panel's first-hand observation of witness).

[13] The Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001 *et seq.* prohibits employers engaged in commerce from requiring employees or prospective employees to submit to polygraph tests. The Act does not apply to government employees.

## III. THE FIFTH CIRCUIT'S DECISION PRESENTS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED.

The Fifth Circuit goes beyond its *Posado* holding to impose for Dr. Blake a ruling that the polygraph results serve as if it were a confession, over his objections, and as to as yet unspecified charges, and further to hold that the court's consideration of such evidence on summary judgment is harmless error. App. 4. Dr. Blake was not permitted to proceed to trial on a material issue of fact arising, at least in part, from his dispute with the polygraph exam. The polygraph exam stood in place of a trial. Despite the substantive impact against Dr. Blake's employment and good name, the Fifth Circuit limited its review to harmless error.

Because of the significant impact on results from unpredictable judicial discretion over the weight and admissibility of polygraph tests, this Court should grant review to harmonize the use of polygraph, or other neuro-scientific, lie detector tests, and to correct the errors of the Fifth Circuit below.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DENNIS L. HORN MSB # 2645
SHIRLEY PAYNE MSB # 4071

HORN & PAYNE, PLLC
Post Office Box 2754
Madison, Mississippi 39130
(601) 853-6090

2007 WL 2201099

United States Court of Appeals, Fifth Circuit.
MDRogerBLAKE, Plaintiff-Appellant,
v.
UNIVERSITY OF MISSISSIPPI MEDICAL CENTER; Doctor Daniel Jones, in his official capacity as Chancellor of the University of MS Medical Center; James Roy Klumb, in official capacity as member of the board of trustees of state institutions of higher learning; Ed Blakeslee, in official capacity as member of the board of trustees of state institutions of higher learning; Thomas W. Colbert, in official capacity as member of the board of trustees of state institutions of higher learning; Doctor Richard A. Crofts, in official capacity as member of the board of trustees of state institutions of higher learning; Doctor L. Stacy Davidson, Jr., in official capacity as member of the board of trustees of state institutions of higher learning; Doctor D.E. Magee, Jr., in official capacity as member of the board of trustees of state institutions of higher learning; Doctor Betty Henderson Neely, in official capacity as member of the board of trustees of state institutions of higher learning; Virginia Shanteau Newton, in official capacity as member of the board of trustees of state institutions of higher learning; Bob Owens, in official capacity as member of the board of trustees of state institutions of higher learning; Aubrey Patterson, in official capacity as member of the board of trustees of state institutions of higher learning; Robin Robinson, in official capacity as member of the board of trustees of state institutions of higher learning; Scott Ross, in official capacity as member of the board of trustees

of state institutions of higher learning; Amy Whitten, in official capacity as member of the board of trustees of state institutions of higher learning; Paul Trussell, Individually and as director of Human Resources of the University of MS Medical Center, Defendants-Appellees.

**No. 06-60496.**

Decided Aug. 2, 2007.

Horn & Payne, Madison, MS, for Plaintiff-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi, (3:05-CV-187).

Before KING, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:*

I.

Blake was employed by the University of Mississippi Medical Center (UMC) as a staff physician. In addition, pursuant to a one-year employment contract, which permitted termination for, *inter alia,*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

For his 42 U.S.C. § 1983 action, RogerBlake challenges an adverse summary judgment, primarily on his claims for deprivation of due process. **AFFIRMED.**

"contumacious conduct", he was a non-tenured assistant professor of surgery.

On 1 October 2004, having been notified of Blake's alleged inappropriate sexual conduct toward another UMC physician, UMC suspended Blake's physician privileges, placing him on paid administrative leave. Regarding the suspension, UMC notified Blake of his bylaws – provided right to request a hearing before its Executive Committee. Blake did not do so.

On 4 October, Blake met with UMC's human-resources director and discussed the alleged misconduct. Subsequently, both Blake and the accusing physician submitted to polygraph examinations.

Settlement discussions between Blake and UMC, which spanned several weeks and involved the possibility of Blake's resigning from his faculty position but having his physician privileges reinstated, were not successful. On 10 December, UMC terminated Blake for "unprofessional conduct . . . involv[ing] a resident physician". In doing so, UMC notified Blake of his "right to file a grievance in regard[] to th[e] decision". Blake did not do so.

Instead, he filed this action, asserting: federal-law claims for deprivation of procedural and substantive due process; and state-law claims for, *inter alia,* breach of contract. After the district court dismissed some of Blake's claims, defendants moved for summary judgment on those that remained: claims through § 1983 against UMC's human-resources

director; equitable claims through § 1983 against the other individual defendants; and state-law claims. On 28 March 2006, the district court denied Blake's motion to strike the polygraph-examination results, and awarded summary judgment against his remaining claims. *Blake v. Univ. of Miss. Med. Ctr.*, No. 3:05-CV-187-BS, 2006 WL 839556 (S.D. Miss. 28 Mar. 2006) (district court opinion).

II.

A.

Blake contests the denial of his motion to strike the polygraph-examination results, maintaining the evidence was unreliable, unsworn, and hearsay. Evidentiary rulings are reviewed for abuse of discretion. *E.g., Kelly v. Boeing Petroleum Servs., Inc.*, 61 F.3d 350, 356 (5th Cir.1995); *see also United States v. Pettigrew*, 77 F.3d 1500, 1514 (5th Cir.1996) (exclusion of polygraph evidence reviewed for abuse of discretion). Of course, an erroneous ruling is reversible error only if it affected the complaining party's substantial rights. FED.R.EVID. 103(a); *see also, e.g., Hodges v. Mack Trucks, Inc.*, 474 F.3d 188, 199 (5th Cir.2006). Based on our review of the record, and essentially for the reasons stated in the district court opinion, admitting the polygraph evidence was *not* an abuse of discretion.

B.

A summary judgment is reviewed *de novo,* applying the same standards as the district court. *E.g., Keelan v. Majesco Software, Inc.,* 407 F.3d 332, 338 (5th Cir.2005). Such judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law". FED.R.CIV.P. 56(c); *see also, e.g., Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party". *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Based on our review of the record, and essentially for the reasons stated in the district court opinion, summary judgment was proper.

III.

For the foregoing reasons, the judgment is

***AFFIRMED.***

2006 WL 839556

United States District Court, S.D. Mississippi, Jackson Division.
RogerBLAKE, M.D. Plaintiff
v.
THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER, Dr. Daniel Jones, in His Official Capacity as Chancellor of the University of Mississippi Medical Center, James Roy Klumb, Ed Blakeslee, Thomas W. Colbert, Dr. Richard A. Crofts, Dr. L. Stacy Davidson, Jr., Dr. D.E. Magee, Jr., Dr. Bettye Henderson Neely, Virginia Shanteau Newton, Bob Owens, Aubrey Patterson, Robin Robinson, Scott Ross, Amy Whitten, in their Official Capacities as Members of the Board of Trustees of State Institutions of Higher Learning and Paul Trussell, Individually and as Director of Human Resources of the University of Mississippi Medical Center Defendants
**No. 3:05 CV 187BS.**

March 28, 2006.

Dennis L. Horn, Horn & Payne, PLLC, Madison, MS, for Plaintiff.

John J. Fraiser, III, John T. Kitchens, Page, Mannino, Peresich & Mcdermott, PLLC, Jackson, MS, for Defendants.

BARBOUR, J.

This cause is before the Court on the following Motions:

1) Defendant Paul Trussell's Motion to Dismiss/Motion for Summary Judgment (filed July 6, 2005, under docket entry no. 25);

2) Motion of Defendant University of Mississippi Medical Center (hereinafter "UMC") to Dismiss and Motion for Summary Judgment as to Equitable and State Law Claims (filed July 28 and 29, 2005, under docket entry nos. 28 and 29, respectively);[1]

3) Plaintiff RogerBlake's Motion to Strike Certain Exhibits Annexed to Defendant Paul Trussell's Motion to Dismiss/Motion for Summary Judgment (filed November 7, 2005, under docket entry no. 44);

4) Defendant Paul Trussell's Motion to Strike Certain Exhibits (filed November 14, 2005, under docket entry no. 61); and

5) Plaintiff RogerBlake's Motion to Strike (filed November 30, 2005, under docket entry no. 70).

Having considered the Motions, Responses, Rebuttals and all attachments to each, as well as supporting and opposing authority, the Court finds that:

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[1] UMC filed the exact same Motion under docket entry no. 28 and 29. Both Motions seek dismissal and/or summary judgment as to the claims against UMC and all individual Defendants.

1) Trussell's Motion to Dismiss/Motion for Summary Judgment is well taken and should be granted;

2) Motion of UMC to Dismiss and Motion for Summary Judgment as to Equitable and State Law Claims is well taken and should be granted;

3) Blake's Motion to Strike Certain Exhibits Annexed to Defendant Paul Trussell's Motion to Dismiss/Motion for Summary Judgment is well taken in part and should be granted in part, and the Motion is not well taken in part and should be denied in part;

4) Trussell's Motion to Strike Certain Exhibits is not taken and should be denied; and

5) Blake's Motion to Strike is well taken in part and should be granted in part, and the Motion is not well taken in part and should be denied in part.

## I. Factual Background and Procedural History

This cause of action arises out of the alleged wrongful termination of Plaintiff RogerBlake, M.D. from his position as Assistant Professor of the Department of Surgery with Defendant UMC. Blake's employment with UMC began at some time in year 2000. At all times which are relevant to this lawsuit, Blake was under an employment contract with UMC which began July 1, 2004, and ended June 30, 2005. *See* Employment Contract, attached as Exhibit "K" to Bill of Particulars (docket entry no. 18). The

employment contract contains a provision which allows for employment termination for "contumacious conduct."[2] *Id.* On September 30, 2004, Blake allegedly engaged in inappropriate sexual conduct with Dr. Heather Wallace, a female urologist at UMC. Specifically, Wallace alleges that Blake duped her "into examining his erect penis." Trussell's Motion to Dismiss/Motion for Summary Judgment (docket entry no. 25), p. 2, ¶ 5.

After the incident was reported to UMC officials, Blake was placed on administrative leave, with pay, effective October 1, 2004. *See* Letter from Turner to Blake dated October 1, 2004, attached as Exhibit "A" to Bill of Particulars; Letter from Woodrell to Blake dated October 1, 2004, attached as Exhibit "B" to Bill of Particulars. On October 4, 2004, Trussell and Barbara Smith met with Blake to discuss the allegations. Trussell Affidavit, p. 2, ¶ 6, attached as Exhibit "E" to Trussell's Motion to Dismiss/Motion for Summary Judgment. Trussell was the Director of Human Resources and Smith was the Equal Employment Opportunity Director at UMC.

Both Wallace and Blake were asked to submit to polygraph examinations. Wallace's polygraph exam occurred on October 4, 2004. Wallace Polygraph Examination Report, attached as Exhibit "C" to

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[2] "Contumacious" is defined as "stubbornly perverse or rebellious; willfully disobedient." *Webster's College Dictionary* 297 (1995).

Trussell's Motion to Dismiss/Motion for Summary Judgment. No deceptive responses were recorded. *Id.* Blake submitted to a polygraph examination on October 12, 2004. Blake Polygraph Examination Report, attached as Exhibit "G" to Trussell's Motion to Dismiss/Motion for Summary Judgment. A deceptive response was indicated regarding whether Blake's penis was erect during Wallace's examination of him. *Id.* The polygraph examiner stated "[i]t is also the opinion of this examiner that counter measures were most likely employed to influence the exam." *Id.*

Seeking to finally resolve the matter, Edwin Cofer wrote Dennis Horn a settlement letter dated November 9, 2004 (hereinafter "November 9 letter"). Cofer was a staff attorney with UMC and Horn was the attorney representing Blake. In relevant part, the November 9 letter stated:

> 1. We will make no report to the Physicians Databank. We will report to the Mississippi State Board of Medical Licensure, and whether or not it reports to the Databank is not within our control.
>
> 2. Upon the receipt of receipt of [sic] Dr. Blake's written and signed resignation from all positions held at the University of Mississippi Medical Center and its instrumentalities, which may be written to only take effect upon the accomplishment of the provisions of this paragraph, we will request that Dr. Blake's suspension of privileges be lifted and that all mention of the suspension be expunged from his credentialing file. If both of

> our requests are granted, the resignation will then take effect; if either is not granted, the resignation will not take effect.[3]

*See* November 9 letter, attached Exhibit "F" to Bill of Particulars (footnote added).

Via two letters dated November 15, 2004 (hereinafter "November 15 letters"), from Blake to Dr. William Turner, Chairman of the Department of Surgery at UMC, Blake resigned from his position as Assistant Professor of Surgery. *See* November 15 letters, attached as part of composite Exhibit "E" to Bill of Particulars. Blake's resignation was premised on lifting the suspension of his hospital privileges and expunging any mention of the suspension from his personnel records. *Id.* Three days later, counsel for Blake was informed that reinstatement of hospital privileges could be done administratively, but that expungement of negative references in Blake's personnel file required authorization by the Executive Committee of the Medical Staff at UMC (hereinafter "Executive Committee"). *See* letter from Cofer to

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[3] Although not specifically described in any of the pleadings before the Court, it appears that the parties viewed Blake's position as Assistant Professor at UMC, and his position as a staff physician with UMC, separate and distinct from one another. Based on the above settlement offer, it appears that if Blake resigned from his position as Assistant Professor, then the suspension of his "privileges" as a staff physician with UMC would be lifted, and he would be able to continue to treat patients at UMC.

Horn dated November 18, 2004, attached as Exhibit "G" to Bill of Particulars.

The Executive Committee met on December 1, 2004, and rejected the proposition of expunging Blake's suspension from the credentialing file. *See* letter from Cofer to Horn dated December 2, 2004, attached Exhibit "H" to Bill of Particulars; UMC Executive Committee Minutes, attached as Exhibit "D" to Trussell's Motion to Dismiss/Motion for Summary Judgment. Cofer nevertheless held the offer open to recommend the restoration of Blake's hospital privileges, if Blake would agree to resign from his job as Assistant Professor of Surgery. *See* letter from Cofer to Horn dated December 2, 2004, attached Exhibit "H" to Bill of Particulars. That offer was to remain open until December 3, 2004. *Id.*

The next communication between the parties was a letter from Trussell to Blake, dated December 10, 2004 (hereinafter "December 10 letter"), which stated in part:

> As a result of unprofessional conduct exhibited by you on or about September 30, 2004, which involved a resident physician, your employment with the University of Mississippi Medical School is herewith terminated effective December 10, 2004.
>
> In accordance with UMC policy you have the right to file a grievance in regards to this decision. Attached you should find a copy of the grievance procedure.

*See* December 10 letter, attached as Exhibit "I" to Bill of Particulars.

Aggrieved by his termination from employment with UMC, Blake filed the subject suit in this Court on March 21, 2005. According to Blake's Complaint:

> On or about October 1, 2004, while performing his duties under a yearly contract, the plaintiff received a letter purporting to suspend all of his privileges at [UMC]. On or about December 10, 2004, while still under a contract guaranteeing his property interest in his employment, the plaintiff received a letter terminating his emolument as an assistant professor at [UMC].

Complaint, p. 3, ¶ 11. Blake's claims are further summarized by the following excerpt from the Complaint:

> This action is brought by RogerBlake, M.D., who seeks all legal remedies for violation of his constitutional rights under color of law as provided by the Civil Rights Act of 1871, 42 U.S.C. § 1983, and pendent Mississippi law claims for violation of the faculty contract non-renewal provisions of the Defendants' Employment Policies and[, in the alternative,] to enforce a settlement with Defendants whereby Defendants and Dr. Blake agreed, in return for Dr. Blake's resignation, to reinstate Dr. Blake's hospital privileges and expunge all disciplinary and negative matter from any and all of the Defendants' personnel and other files.

Complaint, pp. 1-2, ¶ 2.

Although not specifically enumerated in the Complaint, Blake's claims appear to be the following.

- 42 U.S.C. § 1983: violation of substantive due process and procedural due process, Complaint, p. 4, ¶ 16;
- mental anguish, Complaint, p. 4, ¶ 18;
- damage to professional reputation, Complaint, p. 4, ¶ 18;
- breach of contract, Complaint, p. 4, ¶ 20;
- punitive damages, Complaint, p. 4, ¶ 21;
- alternative claim: acceptance of Blake's resignation from his position as Assistant Professor of Surgery in return for reinstatement of his staff privileges as a physician at UMC, and expungement of Blake's personnel file in regard to his suspension, Complaint, p. 5, ¶ 24.

Blake seeks an unspecified amount of compensatory and punitive damages.

The capacities in which the Defendants are sued are significant factors in this case. Following is a list of the categories of Defendants and the capacities in which each category is sued.

*Defendant Dr. Daniel Jones:*

Jones is the Chancellor of UMC. He is sued in his official capacity.

*Defendants James Roy Klumb, Ed Blakeslee, Thomas W. Colbert, Dr. Richard A. Crofts, Dr. L. Stacy Davidson, Jr., Dr. D.E. Magee, Jr., Dr. Bettye Henderson Neely, Virginia Shanteau Newton, Bob Owens, Aubrey Patterson, Robin Robinson, Scott Ross and Amy Whitten:*

These Defendants are members of the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi. Each is sued in his / her official capacity.

*Defendant Paul Trussell, Jr.:*

As stated above, Trussell is the Director of Human Resources for UMC. He is sued in both his official capacity and his individual capacity.

*Defendant UMC:*

UMC is a department of the University of Mississippi created and existing pursuant to § 37-115-1, *et seq.* of the Mississippi Code. Blake contends that UMC was his "employer" within the meaning of 42 U.S.C. § 1983.

On April 19, 2005, a Motion to Dismiss was filed. The Opinion and Order which addressed that Motion was filed on June 23, 2005 (hereinafter "June 23 Opinion"), under docket entry no. 23. Some claims were dismissed through the holdings in the June 23 Opinion, and some claims remain. At the conclusion of the June 23 Opinion, the Court provided a

summary of the status of the remaining claims. That summary follows.

*Defendant UMC:*

All § 1983 claims against UMC are dismissed. The state law claims against UMC, if any, remain.FN5

FN5: The Complaint is not completely clear as to which Defendant(s) the state law claim(s) are asserted.

*Defendants Dr. Daniel Jones, James Roy Klumb, Ed Blakeslee, Thomas W. Colbert, Dr. Richard A. Crofts, Dr. L. Stacy Davidson, Jr., Dr. D.E. Magee, Jr., Dr. Bettye Henderson Neely, Virginia Shanteau Newton, Bob Owens, Aubrey Patterson, Robin Robinson, Scott Ross and Amy Whitten:*

These Defendants are sued in their official capacities. The § 1983 claims against these Defendants for non-equitable money damages are dismissed. The § 1983 claims against them for equitable relief remain. The state law claims, if any, remain.FN6

FN6: *See supra,* footnote 5.

*Defendant Paul Trussell, Jr.:*

Trussell is sued in his official capacity and his individual capacity. Because Trussell did not join in the Motion to Dismiss, all claims against him remain.

June 23 Opinion, pp. 8-9.

The Motions set forth in the introduction of this Opinion are now ripe for consideration.

## II. Analysis

### A. Motions to Strike

The Court must initially consider the Motions to Strike, because the evidence which the parties seek to strike could affect the outcome of the dispositive Motions. Each of the three Motions to Strike is considered under a separate subheading.

#### 1. Blake's Motion to Strike Certain Exhibits Annexed to Defendant Paul Trussell's Motion to Dismiss/Motion for Summary Judgment

Blake seeks to strike certain exhibits from Trussell's Motion to Dismiss/Motion for Summary Judgment. First, Blake seeks to strike page 28 of Exhibit "A." Trussell concedes that page 28 has no relevance to the claims and defenses in this case. Page 28 of Exhibit "A" is therefore stricken.

Blake seeks to strike Wallace's polygraph exam report (Exhibit "C" to Trussell's Motion to Dismiss/ Motion for Summary Judgment) and his own polygraph exam report (Exhibit "G" to Trussell's Motion to Dismiss/Motion for Summary Judgment).Blake provides little argument in support of these prayers for relief. His only arguments are that they "are not

competent evidence" (Motion to Strike, ¶ 2) and that they are "inadmissible polygraph examination results" (Motion to Strike, ¶ 6).

To the extent that Blake is arguing that polygraph examination results are per se inadmissible, he is mistaken. A trial court has discretion to admit polygraph examination results into evidence. *United States v. Pettigrew,* 77 F.3d 1500, 1514 (5th Cir.1996) (citation omitted). The standard by which to measure the admissibility of polygraph results is the familiar *Daubert* test. *Gibbs v. Gibbs,* 210 F.3d 491, 500 (5th Cir.2000). Blake makes no arguments based on the factors set forth in *Daubert.* Therefore, the Court will not strike the polygraph examination reports in issue based on incompetency of that evidence.

To the extent that Blake seeks to strike the polygraph examination reports as hearsay and/or unauthenticated evidence, that argument is not well taken either. Technically, an expert report included as an exhibit to a dispositive Motion should be accompanied by an affidavit of the report preparer which attests to its authenticity. No such affidavits were included with the subject polygraph reports. However, both reports were signed by the polygraph examiner, and Trussell, through his sworn affidavit, attested to the fact that the tests were administered at the behest of UMC. Also, Blake makes no argument to the effect that the polygraph exams were not administered, or that the results differed from what appears on the face of the exhibits in question. Under these facts, the Court excuses the requirement of an

accompanying affidavit. The polygraph examination reports are not stricken on the basis of hearsay and/or lack of authentication.

Blake next seeks to strike Exhibit "D" to Trussell's Motion to Dismiss/Motion for Summary Judgment, which is a copy of UMC Executive Committee Minutes of December 1, 2004. He argues that the minutes should be stricken on the basis of "authenticity" because they conflict with other evidence. The Court finds that this argument is not well taken.

Blake also seeks to strike several paragraphs of Trussell's Affidavit, which is attached as Exhibit "E" to Trussell's Motion to Dismiss/Motion for Summary Judgment. To the extent that some of the statements in the Affidavit contain legal conclusions, those statements are stricken. The Court rejects the remainder of Blake's arguments regarding striking portions of Trussell's Affidavit.

Based on the above holdings, the Court finds that the Motion to Strike Certain Exhibits Annexed to Defendant Paul Trussell's Motion to Dismiss/Motion for Summary Judgment should be granted in part, and that it should be denied in part.

2. Trussell's Motion to Strike Certain Exhibits

As an exhibit to Blake's Response to Trussell's Motion to Dismiss/Motion for Summary Judgment,

Blake included a copy of the UMC Executive Committee Minutes of January 5, 2005. Trussell argues that this exhibit should be stricken as irrelevant. The Court finds that this Motion should be denied.

3. Blake's Motion to Strike

Through the Motion to Strike filed by Blake on November 30, 2005, Blake seeks to strike the same Affidavit addressed above in section II.A.1. of this Opinion. For the reasons stated in that section of the Opinion, the subject Motion should be granted in part and denied in part.

B. Defendant Paul Trussell's Motion to Dismiss/Motion for Summary Judgment

Through the Motion to Dismiss/Motion for Summary Judgment, Defendant Trussell seeks to dismiss the § 1983 claims against him in both his official and his individual capacity. For the reasons set forth in the June 23 Opinion, the official capacity claims against Trussell under § 1983 for non-equitable money damages are dismissed. The remaining claims against Trussell and the defenses thereto are considered in the following analyses.

1. Section 1983 Claims Against Trussell

The Court begins by analyzing the § 1983 claims asserted against Trussell. 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(Emphasis added). In the subject case, the alleged "deprivation" suffered by Blake was his termination in violation of both the substantive and procedural due process provisions of the United States Constitution. Separate tests must be considered to determine whether Blake's procedural due process rights and/or his substantive due process rights were violated.

a. Procedural Due Process

First considered is Blake's procedural due process claim. "We analyze procedural due process questions using a two-step inquiry: First, we determine

whether the state has deprived a person of a liberty or property interest; if there has been such a deprivation, we must determine whether the procedures relative to that deprivation were constitutionally sufficient." *Welch v. Thompson* 20 F.3d 636, 639 (5th Cir.1994).

It is undisputed that Blake was terminated from his position with UMC before the expiration of his one year employment contract expired. The Court therefore finds that the first test for Blake's procedural due process claim is met, i.e., he was deprived of a property interest. *See Stewart v. Bailey,* 556 F.2d 281, 285 (5th Cir.1977); *Coggin v. Longview Indep. Sch. Dist.,* 337 F.3d 459, 462 (5th Cir.2003).

Under the second test for Blake's procedural due process claim, the Court must consider whether the procedure surrounding his employment termination was constitutionally sufficient. The required process due to an employee with a property interest in employment is "a pretermination opportunity to respond, coupled with post-termination administrative procedures. . . ." *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 547-48, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). If an employer reasonably perceives hazards by retaining the employee during the pendency of the above process, then the problem can be solved by suspension with pay. *Id.* at 544-45.

In *Stewart,* 556 F.2d at 285, the United States Court of Appeals for the Fifth Circuit reiterated the four-step process that must be afforded to a teacher

before termination from a job in which a property interest has vested. The steps are:

(a) He be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist;

(b) He be advised of the names and the nature of the testimony of witnesses against him;

(c) At a reasonable time after such advice, he must be accorded a meaningful opportunity to be heard in his own defense; and

(d) That hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.

*Id.* (citation omitted).

In the subject case, the alleged incident of inappropriate sexual conduct occurred on Thursday, September 30, 2004. On the following day, Friday, October 1, 2004, Blake was placed on administrative leave with pay. Letter from Turner to Blake dated October 1, 2004, attached as Exhibit "A" to Bill of Particulars; Letter from Woodrell to Blake dated October 1, 2004, attached as Exhibit "B" to Bill of Particulars; Trussell's Affidavit, ¶¶ 5-6, attached as Exhibit "E" to Trussell's Motion to Dismiss/Motion for

Summary Judgment.[4] Placing Blake on administrative leave with pay cured any potential prejudice through relieving Blake of his duties pending the outcome of the investigation. *See Loudermill,* 470 U.S. at 544-45. Also on October 1, Blake was specifically informed of his right to a hearing before the Executive Committee. Letter from Woodrell to Blake dated October 1, 2004, attached as Exhibit "B" to Bill of Particulars.

On October 4, 2004, Trussell and Smith met with Blake to discuss the allegations. Trussell Affidavit, p. 2, ¶ 6, attached as Exhibit "E" to Trussell's Motion to Dismiss/Motion for Summary Judgment. During this meeting, Blake was informed of the allegations against him, informed of who made the allegations, and given an opportunity to convey his rendition of the events. *Id.*; Transcript of Blake's Recorded Statement of October 4, 2004, attached as Exhibit "G" to Blake's Response to Trussell's Motion to Dismiss/Motion for Summary Judgment. The Court finds that through the two letters to Blake dated October 1 and through the October 4 meeting, the standards for

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[4] The letter from Turner to Blake is ambiguous in that in one sentence it states that the suspension is with pay, and in another it states that the suspension is without pay. Letter from Turner to Blake dated October 1, 2004, attached as Exhibit "A" to Bill of Particulars. However, both of the other Exhibits cited above state that the suspension was with pay, and the parties appear to agree that Blake was suspended with pay. The Court therefore reasonably assumes that the Blake's October 1 suspension was with pay.

the first two procedural due process steps were met. This finding is based on the facts that Blake was: (a) advised of the reason for his suspension and/or proposed termination in sufficient detail to enable him to show any errors in the allegation of sexual misconduct; and (b) advised that Wallace was the person who made the allegation.

The third step for proper due process is according the employee a meaningful opportunity to be heard in defense of the claims, within a reasonable period of time. The October 1 letter in which Blake was afforded the opportunity to be heard before the Executive Committee satisfied this factor in part, notwithstanding the fact that Blake did not avail himself of the opportunity. The October 4 meeting described above further satisfied this requirement in part. Also, on October 12, 2004, Blake submitted to a polygraph examination regarding his rendition of the subject events. Blake's Polygraph Examination Report, attached as Exhibit "G" to Trussell's Motion to Dismiss/Motion for Summary Judgment. Although the results of the polygraph exam were not completely favorable to Blake, the process itself afforded him another meaningful opportunity to be heard in defense of Wallace's allegations against him.

The fourth and final step for proper due process is a hearing before an impartial tribunal. "The Due Process Clause requires provision of a hearing 'at a meaningful time.'" *Loudermill,* 470 U.S. at 547 (citation omitted). As stated above, the hearing may involve less formal proceedings pre-termination,

coupled with the opportunity for a more formal proceeding post-termination. *Id.* at 547-48.

In this case, Blake was placed on leave with pay on October 1, 2004, one day after the alleged misconduct occurred. Three days later on October 4, he was given an informal hearing with Trussell, the Director of Human Resources, and Smith, the Equal Employment Opportunity Director at UMC. Through written correspondences dated November 9, November 15, November 18, and December 2, 2004, the parties proposed resolutions of the matter to each other. The pivotal issue was expungement of references of the subject incident from Blake's personnel file. Blake requested the expungement, and UMC refused to comply with the request. This issue created an impasse.

Based on the breakdown in negotiations, UMC opted to finally terminate its employment relationship with Blake. The termination notice was embodied in a letter from Trussell to Blake dated December 10, 2004. In part, the letter stated: As a result of unprofessional conduct exhibited by you on or about September 30, 2004, which involved a resident physician, your employment with the University of Mississippi Medical School is herewith terminated effective December 10, 2004.

In accordance with UMC policy you have the right to file a grievance in regards to this decision. Attached you should find a copy of the grievance procedure.

Letter from Trussell to Blake dated December 10, 2004, attached Exhibit "I" to Bill of Particulars (emphasis added). Rather than avail himself of the grievance procedure offered by UMC, Blake filed the subject suit on March 21, 2005.

The Court finds that the fourth step for proper due process was met in this case. Not only was Blake given a speedy initial hearing to present his version of events, he had the opportunity to engage in a relatively lengthy negotiation process to resolve the issue. Finally, he was offered the opportunity to avail himself of the standard grievance procedure offered by UMC, but waived that right by failing to take advantage of the procedure. *See Downing v. Williams,* 624 F.2d 612, 630 (5th Cir.1980), *dissent adopted as majority opinion on reh'g,* 645 F.2d 1226 (5th Cir.1981) (holding that an aggrieved employee's failure to take advantage of a due process hearing results in waiver of the right to such hearing). Under these facts, the Court finds that Blake was afforded procedural due process as required by the United States Constitution.

Additionally, UMC complied by its own termination procedures. The Faculty Handbook states:

> Termination for cause of a tenured faculty member or the dismissal for cause of a faculty member prior to the expiration of a term appointment shall not be recommended by the institutional executive officer until the faculty member has been afforded the opportunity for a hearing.

In all cases, the faculty member shall be informed in writing of the proposed action against him/her and that he/she has the opportunity to be heard in his/her own defense. Within 10 calendar days of notification of the proposed action and opportunity to be heard, the faculty member shall state in writing his/her desire to have a hearing.[5]

Faculty Handbook, p, 25, attached as Exhibit "A" to Trussell's Motion to Dismiss/Motion for Summary Judgment.

UMC followed the requirements set forth in the Faculty Handbook. Blake was informed in writing of the proposed action to be taken against him. Letter from Turner to Blake dated October 1, 2004, attached as Exhibit "A" to Bill of Particulars; Letter from Woodrell to Blake dated October 1, 2004, attached as Exhibit "B" to Bill of Particulars. He was offered the opportunity for a pre-termination hearing on October 1, 2004. Letter from Woodrell to Blake dated October 1, 2004, attached as Exhibit "B" to Bill of Particulars (stating that "[y]ou are further notified that you may

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[5] Blake was a "tenure track" employee, not a "tenured" employee. However, because he was under a one year employment contract, Blake was a faculty member under "a term appointment." The termination procedure for a nontenured track faculty member under a term appointment is stated on page 27 of the Faculty Handbook. *See* Faculty Handbook, p. 27, attached as Exhibit "A" to Trussell's Motion to Dismiss/Motion for Summary Judgment. The procedure stated on page 27 refers the reader to the procedure stated on page 25 of the Faculty Handbook. *Id.* The procedure stated on page 25 is cited above.

request that the Executive Committee be convened pursuant to Article VIII of the Bylaws."). He was offered an opportunity for a post-termination hearing through his termination letter dated December 10, 2004. Letter from Trussell to Blake dated December 10, 2004, attached as Exhibit "I" to Bill of Particulars (stating that "you have the right to file a grievance in regards to this decision.").

As stated above, Blake never requested a formal hearing. This failure on Blake's part does nothing to diminish the fact that UMC complied with procedural due process by making such available to him. To the extent that Blake contends that he did not request a hearing because the Executive Committee which he would have appeared before was biased against him, that argument is unsupported and without merit.

The Court finds that Blake was not deprived of procedural due process through his employment termination. This claim against Trussell must be dismissed.

b. Substantive Due Process

Next considered is Blake's substantive due process claim. The two-part test for a substantive due process claim was articulated by the Fifth Circuit in *Mikeska v. City of Galviston,* 419 F.3d 431 (5th Cir.2005). Substantive due process claims require the satisfaction of two tests. "First, [a plaintiff] must allege a deprivation of a constitutionally protected right." *Id.* at 434 (citation omitted). The second test is

whether the governmental action was 'rationally related to a legitimate governmental interest.'" *Id.* (citation omitted).

It is undisputed that Blake was terminated from his position with UMC before the expiration of his one year employment contract. The Court therefore finds that the first test for Blake's due process claim is met, i.e., he was deprived of a constitutionally protected right. *See Stewart,* 556 F.2d at 285; *Coggin,* 337 F.3d at 462.

Under test two, Blake's termination must have been rationally related to a legitimate governmental interest. Stated another way, Blake must prove that his termination "was arbitrary or not reasonably related to a legitimate governmental interest." *Williams v. Texas Tech Univ.,* 6 F.3d 290, 294 (5th Cir.1993) (emphasis added; citation omitted). Further, "[j]udicial evaluation of academic decisions requires deference and they are overturned only if they are 'such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.'" *Id.* (citing *Regents of the Univ. of Michigan v. Ewing,* 474 U.S. 214, 225, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985)).

Based on the facts as presented in section I. of this Opinion, and based on and the analyses and facts presented in section II.B.1.a. of this Opinion, the Court finds that Blake has failed to meet the second test for his substantive due process claim. That is, his employment termination for the reasonably well

supported allegation of sexually inappropriate behavior was rationally related to a legitimate government interest. Accordingly, the substantive due process claim against Trussell must be dismissed.

c. Qualified Immunity

In the alternative to the above holdings, the Court finds that Trussell is entitled to qualified immunity with regard to the § 1983 claims asserted against him in his individual capacity. Qualified immunity applies to public officials in their individual capacities, and not in their official capacities. *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 337 (5th Cir.2003) (citation omitted). Under *Foley*, qualified immunity applies to § 1983 claims. *Id.* at 338. The *Foley* opinion continues by holding that

> [i]n addressing the claim of a public official to qualified immunity, we engage in a two-step analysis. First, we must determine whether the plaintiff has made a sufficient showing that the official violated a clearly established constitutional or statutory right. If the answer is in the affirmative, we then ask whether the official's actions were objectively reasonable in light of the clearly established right. *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991).

*Id.* at 337.

Regarding the second factor, "[p]ublic officials are entitled to qualified immunity when 'their conduct

does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Foley,* 355 F.3d at 337 (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). However, "the 'reasonable person' step is not reached unless the court first finds that the conduct alleged by the plaintiff, if proved, would constitute a violation of his clearly established rights." *Id.* (citation omitted).

Applying these standards to the subject case, the Court finds that although Blake was denied the right to complete his one year employment contract, the denial of that right was justified under the employment contract provision for termination based on "contumacious conduct." *See* Employment Contract, attached as Exhibit "K" to Bill of Particulars. Trussell's termination of Blake's employment with UMC was objectively reasonable under the facts of this case. For these reasons, the Court finds that Trussell is entitled to qualified immunity with regard to the § 1983 claims asserted against him in his individual capacity.

d. Conclusion – § 1983 Claims Against Trussell

Blake has failed to make a showing that Trussell deprived him of any rights, privileges, or immunities secured by the Constitution, as contemplated by the provisions of § 1983 and related case law. Therefore, the § 1983 claims against Trussell must be dismissed.

This dismissal includes official capacity and individual capacity claims, as well as monetary and non-monetary equitable claims asserted against Trussell under § 1983. In the alternative, Trussell is shielded by qualified immunity from liability for all of the § 1983 claims asserted against him in his individual capacity.

2. State Law Claims Against Trussell

The Complaint is not completely clear as to whether state law claims are asserted against Trussell. The state law claims were not addressed in Trussell's Motion to Dismiss/Motion for Summary Judgment. Therefore, to the extent that state law claims are asserted against Trussell, those claims cannot be dismissed through Trussell's Motion. It does appear, however, that the claims against Trussell are included in the Motion to Dismiss and Motion for Summary Judgment analyzed below. *See* Defendants' Brief in Support of Motion to Dismiss and Motion for Summary Judgment as to Equitable and State Law Claims (docket entry no. 30), p. 1 (stating that UMC "and all other named defendants" joined in the Motion). The state law claims against Trussell will be addressed below accordingly.

C. Motion to Dismiss and Motion for Summary Judgment of Defendant UMC and Other Individual Defendants

1. Section 1983 Substantive and Procedural Due Process Claims

For the reasons set forth above in sections II.B.1.a. and b. of this Opinion, all § 1983 claims against the moving Defendants must be dismissed.

2. State Law Claims

Defendants also seek dismissal of the state law claims against them. The state law claims are: mental anguish, Complaint, p. 4, ¶ 18; damage to professional reputation, Complaint, p. 4, ¶ 18; breach of contract, Complaint, p. 4, ¶ 20; punitive damages, Complaint, p. 4, ¶ 21; and an alternative claim-acceptance of Blake's resignation from his position as Assistant Professor of Surgery in return for reinstatement of his staff privileges as a physician at UMC, and expungement of Blake's personnel file in regard to his suspension, Complaint, p. 5, ¶ 24. Each of these claims is addressed below.

a. Breach of Contract

Blake contends that UMC breached its employment contract with him by unilaterally terminating their employment relationship before expiration of the one year contract term. The Court finds that this argument is without merit because the employment contract contained a for cause termination provision

for "contumacious conduct." *See* Employment Contract, attached as Exhibit "K" to Bill of Particulars. The evidence before the Court indicates that UMC was within its rights to terminate Blake because the alleged inappropriate sexual conduct fell under the purview of "contumacious conduct." Further, the evidence gathered by UMC indicated a reasonable probability that Blake engaged in the alleged misconduct. For these reasons, the breach of contract claim will be dismissed.

b. Damage to Professional Reputation

In order for Blake to succeed on his damage to professional reputation claim, Defendants must have wrongfully taken some action to damage Blake's reputation. Based on the facts before the Court, Defendants operated within their allowable bounds in all dealings with Blake and, therefore, engaged in no wrongful action. This claim must be dismissed.

c. Mental Anguish

Blake does little to develop his mental anguish claim. That claim must be dismissed because under Mississippi law, "a cause of action for intentional infliction of emotional distress in a workplace environment has usually been limited to cases involving a pattern of deliberate, repeated harassment over a period of time." *Lee v. Golden Triangle Planning & Dev. Dist., Inc.*, 797 So.2d 845, 851 (Miss.2001) (citation omitted); *Starks v. City of Fayette,* 911 So.2d

1030, 1036 (Miss.Ct.App.2005) (citations omitted). Such a claim "will not ordinarily lie for mere employment disputes." *Lee,* 797 So.2d at 851 (citation omitted); *Starks,* 911 So.2d at 1036 (citations omitted). "Only in the most unusual cases does the conduct [of an employer] move out of the realm of an ordinary employment dispute into the classification of extreme and outrageous, as required for the tort of intentional infliction of emotional distress." *Raiola v. Chevron, U.S.A., Inc.,* 872 So.2d 79, 85 (Miss.2004) (citation omitted). Blake has failed to meet his burden to come forth with evidence sufficient to meet the above standards, thus the claim for mental anguish must be dismissed.

d. Alternative Claim-Acceptance of Blake's Resignation from his Position as Assistant Professor of Surgery in Return for Reinstatement of his Staff Privileges as a Physician at UMC, and Expungement of Blake's Personnel File in Regard to his Suspension

Blake argues that an agreement was made in which he would resign from his position as Assistant Professor of Surgery in return for: (1) reinstatement of his staff privileges as a physician at UMC; and (2) expungement of Blake's personnel file in regard to his suspension. As described in detail in section I. of this Opinion, the parties engaged in ongoing negotiations regarding this issue. Ultimately, UMC refused to agree to expunge Blake's personnel file. Cofer nevertheless

offered to recommend the restoration of Blake's hospital privileges, if Blake would agree to resign from his job as Assistant Professor of Surgery. *See* letter from Cofer to Horn dated December 2, 2004, attached Exhibit "H" to Bill of Particulars. That offer was to remain open until December 3, 2004. *Id.* With Blake's failure to accept the offer by December 3, the offer expired by its own terms, which renders the subject claim without merit and ripe for dismissal.

e. Punitive Damages

With the dismissal of all of Blake's substantive state law claims, the claim for punitive damages must be dismissed as well.

f. Conclusion-State Law Claims

Based on the above analyses, the Court finds that all of the state law claims against all of the Defendants should be dismissed.

III. Conclusion

Defendants have met their burden to prove that no genuine issues of material fact exist with regard to Blake's claims against them. This suit must therefore be dismissed in its entirety.

Based on the holdings presented above:

IT IS THEREFORE ORDERED that Defendant Paul Trussell's Motion to Dismiss/Motion for Summary Judgment (docket entry no. 25) is hereby granted.

IT IS FURTHER ORDERED that the Motion of Defendant University of Mississippi Medical Center to Dismiss and Motion for Summary Judgment as to Equitable and State Law Claims (docket entry nos. 28 and 29) are hereby granted.

IT IS FURTHER ORDERED that Plaintiff Roger-Blake's Motion to Strike Certain Exhibits Annexed to Defendant Paul Trussell's Motion to Dismiss/Motion for Summary Judgment (docket entry no. 44) is hereby granted in part and denied in part, in accordance with the holdings presented above.

IT IS FURTHER ORDERED that Defendant Paul Trussell's Motion to Strike Certain Exhibits (docket entry no. 61) is hereby denied.

IT IS FURTHER ORDERED that Plaintiff Roger-Blake's Motion to Strike (docket entry no. 70) is hereby granted in part and denied in part, in accordance with the holdings presented above.

A Final Judgment will be entered which dismisses this case with prejudice.

SO ORDERED.

---

*Wayne Humphreys, Polygraph Examiner, Inc.*
*101 Ferry Dr. Brandon, MS 39047 208-6585*

## POLYGRAPH EXAMINATION REPORT

To: Inv, Lee Tucker, University of Mississippi Medical Center Police Department

Re: Polygraph Examination of Dr. Roger Blake

Date: Oct. 13, 2004

Dr. Roger Blake submitted to a polygraph examination at the University of Mississippi Medical Center Police Department on Oct. 12, 2004 at Jackson, Mississippi. The purpose of the exam was to determine if Roger was being truthful concerning an examination performed on him by Dr. Heather Wallace.

The circumstances of this case were made known to this examiner by Barbara Smith and additional information was obtained from the examinee.

Dr. Blake was examined by Dr. Heather Wallace concerning a medical condition of his penis. Dr. Wallace states that there was nothing wrong with the penis, and feels that it was a sexual encounter set up by Dr. Blake. Dr. Blake states that the exam was a Medical exam and nothing more. Dr. Blake states that his penis was not erect at any time during the exam and Dr. Wallace states that it was.

The following relevant questions were asked on two polygraph exams after being explained, reviewed and rehearsed.

Did you remember asking Dr. Wallace to perform an exam on you? (No)
Was your penis erect at anytime during the exam? (No)
In your mind, was the exam medical in nature only? (Yes)
Was the fore skin on your penis removed by Dr. Wallace at each examination? (Yes)

**The result of the exam is that deceptive response was recorded on the relevant question of his penis being erect at anytime during the exam. There was no deceptive response on any of the other questions. In the opinion of this examiner, based on the charted responses, it is highly probable that Dr. Blake's penis was erect at some point during the exam. It is also the opinion of this examiner that counter measurers were most likely employed to influence the exam.**

/s/ Wayne Humphreys
Wayne Humphreys
Polygraph Examiner

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

ROGER BLAKE, M.D. — PLAINTIFF

VERSUS — NO. 3:05CV187WHB-AGN

THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER, ET AL. — DEFENDANTS

---

**VIDEOTAPED DEPOSITION OF PAUL TRUSSELL**

Deposition Taken at the Instance of
THE PLAINTIFF

In the Offices of
University of Mississippi Medical Center
Legal Department
Jackson, Mississippi

On Thursday, September 8, 2005
Commencing at 9:24 a.m.

REPORTED BY: LORI P. GALLASPY
Registered Professional Reporter
MS CSR #1630

* * *

[38] tenure-track status.

Q Thank you. And if I could – well, I'll ask you this. I don't think we need to look at the document. At the time Dr. Blake was terminated from UMC, he was in the middle of an employment contract for a particular year, was he not?

A That would be correct.

Q May I see Exhibit 2, please, sir?

A Yes, sir.

Q I'm going to direct your attention to Exhibit I, letter I, of Exhibit 2 and ask you if that is a letter that you sent Dr. Blake terminating his employment.

A Yes, sir.

Q And this was the letter you sent after consultation with officials, as you explained to me earlier in this deposition. Correct?

A Yes, sir.

Q And attached to that letter you sent a – the next page, sir, you sent a grievance procedure.

A Yes, sir.

Q Of three pages.

A Yes, sir. Actually, I believe it's – total is. . . .

Q I don't think you sent him Exhibit J. If you'll –

* * *

[44] BY MR. HORN:

Q Answer, please.

MR. FRAISER: You may answer.

A That's correct.

BY MR. HORN:

Q And after your investigation, you decided that you should terminate Dr. Blake's employment with University of Mississippi Medical Center. Right?

A Based on the evidence that was garnered through the investigation, it was determined that Dr. Blake's behavior was egregious enough to warrant his separation from the University of Mississippi Medical Center, that's correct.

Q And the separation was effected by Exhibit I to Exhibit 2, which is your December 10, 2004, letter to Dr. Blake with a grievance procedure attached thereto.

A That's correct.

Q Now, did Mr. Cofer tell you that the grievance procedure you attached to the December 10, 2004, was the grievance procedure you should use? Is that your defense?

A That's –

MR. FRAISER: Object to the question calling for, in effect, a legal conclusion in asking him what his defense is.

MR. HORN: Jim, all through this affidavit and [45] your motion to dismiss you use advice of counsel as a defense, so I'm asking what advice counsel gave that this witness is proffering as a defense. And that's my question.

MR. FRAISER: Well, the way you posed the question, Dennis, was is that your defense, as if that's your only defense. And it's also calling for a legal conclusion from him. I'm the one who pled that.

MR. HORN: Well, it's in his affidavit.

MR. FRAISER: I understand. But he acted upon advice of counsel. He didn't say that was his defense.

MR. HORN: Can you find the question?

(Question read.)

MR. FRAISER: Same objection. You may answer.

A Well, advice of counsel, that's the procedure that we've used in all our dealings with tenure-track faculty members.

BY MR. HORN:

Q What other faculty members have you terminated utilizing the grievance procedure you used for Dr. Blake?

MR. FRAISER: Objection. That's beyond the scope of allowable and excluded by judicial order and instruct you not to answer.

BY MR. HORN:

Q You say you acted upon advice of counsel in handling Dr. Blake. What exact advice did you utilize in

* * *

---

Exhibit "I"

THE UNIVERSITY OF MISSISSIPPI
MEDICAL CENTER
2500 North State Street
JACKSON, MISSISSIPPI 39216-4505

Department of Human Resources
Director's Office

Area Code 601
984-1130

December 10, 2004

Dr. Roger Blake
1119 Gerrets Landing
Brandon, MS 39047

Dear Dr. Blake:

As a result of unprofessional conduct exhibited by you on or about September 30, 2004, which involved a resident physician, your employment with the University of Mississippi Medical School is herewith terminated effective December 10, 2004.

You may contact Ms. Cathy Brister, Associate Director for Benefits at 985-5183 to arrange for out-processing.

In accordance with UMC policy you have the right to file a grievance in regards to this decision. Attached you should find a copy of the grievance procedure.

Sincerely,

/s/ Paul Trussell
Paul Trussell, Jr.
Director, Human Resources

PTjr/gm

Attachment

cc: Hon. Eddie Cofer
Dr. William Turner
Mr. Ted Woodrell

---

## GRIEVANCE PROCEDURE FOR FACULTY PERSONNEL

### I. GENERAL

This policy is designed to provide a formalized procedure whereby full-time faculty members may receive prompt and fair consideration of grievances. For the purpose of this policy, the term "faculty member" shall apply to all individuals shown in the offical [sic] University of Mississippi Medical Center budget as occupying one of the accepted full-time faculty ranks other than sutdent [sic] instructors such as interns and residents. Grievances may arise in relation to personnel policies, practices and procedures including working hours, working conditions, leaves, promotions and other conditions of employment. This policy

is not designed to curtail informal day-to-day contact between department chairmen and faculty members, but rather to provide a formalized procedure to supplement these contracts.

A grievance by a faculty member, other than for dismissal or tenure matters, should follow the procedure set forth in Section II below. Discharge and tenure grievances will follow the procedure established by the University of Misissippi [sic] Medical Center Tenure Policy.

## II. GRIEVANCE PROCEDURE

### A. First Step - Department Head*

1. The faculty member should discuss the grievance with the department chairman informally. If the grievance is not then resolved, the faculty member may present his grievance formally by submitting it in writing to the department chairman within ***15 working days***** after the occurrence of the act

---

* Coordinator in School of Nursing

** The term "working days" as it appears throughout this document is defined to include the period from Monday through Friday of each week, excluding those days which are designated as holidays by the official Medical Center calendar or by action of the Vice Chancellor.

causing the grievance or when the facts pertaining thereto become available to the faculty member.***

2. The grievance should then be more fully discussed by the department chairman and the faculty member and, if possible, the department chairman should resolve the problem at the initial meeting.

3. If the department chairman does not have sufficient information upon which to base a decision, the faculty member will be advised as to when he will receive a decision. The decision must be given to the faculty member in writing by the department chairman with ***10 working days*** after receipt of the request for a formal review. The department chairman will then complete the "Department Chairman's Decision" part of the form and further process it.

4. Faculty members who are not satisfied with the decision of the department chairman may present the matter to the dean for further consideration as set forth in the Second Step.

---

*** The faculty member shall state his formal grievance on the first part of the form attached to the "Faculty Grievance Report" (Attachment 1) called "Faculty Member's Statement of Grievance (or written grievance attached)"

**B. Second Step – Dean***

1. The request for Second Step consideration will be made through the department chairman. Should a faculty member fail to request Second Step consideration in writing within ***five working days*** after receipt of the chairman's written decision, the matter will be considered settled.

2. If requested to do so by the faculty member the department chairman will arrange for him to meet with the appropriate dean. The date for this meeting will be no later than ***10 working days*** after the department chairman has received the request.

3. At the meeting of the faculty member and the dean, the grievance will be fully discussed. In the event that there is need for counseling or further investigation, the meeting shall be temporarily adjourned but will be rescheduled as expeditiously as possible. At the meeting, or its continuation, the faculty member may be given a verbal decision on the relief he seeks.

4. The dean will render the decision in writing to the faculty member with ***five working days*** of the final meeting, and complete that portion of the Faculty Grievance Report pertaining to his review of the grievance. A copy

---

* School of Medicine – Associate Dean for Academic Affairs

Basic Sciences – Dean of school in which the faculty member appears in budget

of the decision and the Faculty Grievance Report will be forwarded to the Vice Chancellor for Health Affairs. (These materials will be eventually filed in the Division of Human Resources.)

5. A faculty member who is not satisfied with the decision at the dean level may appeal to the Vice Chancellor for Health Affairs for further consideration, as set forth in the Third Step.

**C. Third Step – Faculty Grievance Committee Review****

1. Should a faculty member fail to request Third Step consideration in writing to his dean within ***five working days*** after receiving written notice of the Second Step decision, the matter will be considered settled. At the request of the faculty member within five working days, the dean will notify the Vice Chancellor for Health Affairs of the the [sic] request for further review by the Faculty Grievance Committee.

2. The Director of Human Resources will arrange for the faculty member to meet with

---

** Committee shall be composed of the Assistant Vice Chancellor, one faculty member appointed by the Vice Chancellor for Health Affairs from school other than that in which complainant holds an appointment and one faculty member. The Director of Human Resources will serve as secretary of the Review Committee in a nonvoting capacity

the committee. This meeting will be held as expeditiously as possible after the employee's written request for review by the committee. If further counseling, investigation or consideration is advisable, the meeting will be temporarily adjourned but will be rescheduled as expeditiously as possible. At the meeting or its continuation, the faculty member may be informed of the committee's recommendation to the Vice Chancellor. The committee's recommendation will be transmitted in writing to the Vice Chancellor and the faculty member within ***seven working days*** of the meeting.

3. The Vice Chancellor's decision, together with the reasons therefor, shall be confirmed to the faculty member in writing within ***15 working days*** of the Vice Chancellor's receipt of the committee's recommendation. The Vice Chancellor may either concur, return the decision for further consideration or overrule the decision. If the decision is overruled, written reasons should be given to the committee and to the faculty member. Copies of all decisions and the Faculty Grievance Report will be forwarded to the Director of Human Resources for filing.

## III. DISCLAIMER ON TIME LIMIT

In the event of the unavailability of a faculty member's department chairman or dean, or the Assistant Vice Chancellor, so that any of them cannot conduct or participate in the hearings or review heretofore set

out, the faculty member shall be so advised, and he may, at that time, request a postponement of the scheduled hearing or review; otherwise, in the case of unavailability of a department head, the acting department head of the involved faculty member and, in the case of the unavailability of a dean or the Assistant Vice Chancellor, the designee of the dean or of the Assistant Vice Chancellor respectively shall conduct or participate in the hearing or review.

## IV. SEPARATE GRIEVANCE PROCEDURES SHALL BE MUTUALLY EXCLUSIVE

In the case of those individuals who are employees of some department or administrative unit within the Medical Center and who also occupy a budgeted faculty position of less than 1.00 full-time equivalency, the separate grievance procedures for Medical Center employees and faculty shall be mutually exclusive, depending on the nature of the alleged grievance. For some employees, only those grievances related to the faculty appointment shall be subject to this Grievance Procedure for Faculty Personnel, while all other grievances shall come under the jurisdiction of the regular Medical Center Employees Grievance Procedure. The Director of Human Resources can provide guidance to such employees on which grievance procedure shall be used.

**THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER**
**Faculty Grievance Report**

Name of Faculty Member _____ Date of Grievance ____

**DEPARTMENT CHAIRMAN'S REPORT**
Faculty Member's Statement of Grievance (or written grievance attached)

_____

_____

_____

Signed _____
Faculty Member Date

Department Chairman's Decision _____

_____

_____

Review Requested: Yes ☐ No ☐

Date _____
Signed _____
Department Chairman Date

******

**DEAN'S REPORT**

Date of Meeting _____

Dean's Decision _____

_____

_____

Review Requested: Yes ☐ No ☐

Date _____
Signed _____
Dean Date

******

**COMMITTEE REVIEW**

Date of Meeting _____

Committee Recommendation _____

_____

Signed _____

Chairman of the Committee — Date

******

**VICE CHANCELLOR'S DECISION** (Vice Chancellor will circle the appropirate [sic] action)

Concur — Returned for further consideration — Overrule

Signed _____

Vice Chancellor for Health Affairs — Date

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

ROGER BLAKE, M.D. — PLAINTIFF

VERSUS — NO. 3:05CV187WHB-AGN

THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER, DR. DANIEL JONES, IN HIS OFFICIAL CAPACITY AS CHANCELLOR OF THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER, JAMES ROY KLUMB, ED BLAKESLEE, THOMAS W. COLBERT, DR. RICHARD A. CROFTS, DR. L. STACY DAVIDSON, JR., DR. D.E. MAGEE, JR., DR. BETTYE HENDERSON NEELY, VIRGINIA SHANTEAU NEWTON, BOB OWENS, AUBREY PATTERSON, ROBIN ROBINSON, SCOTT ROSS, AMY WHITTEN IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING AND PAUL TRUSSELL, INDIVIDUALLY AND AS DIRECTOR OF HUMAN RESOURCES OF THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER — DEFENDANTS

DEPOSITION OF HEATHER MORGAN WALLACE

Deposition Taken at the Instance of Plaintiff
In the Offices of The University of Mississippi
Medical Center
Jackson, Mississippi

On September 8th, 2005
Commencing at 1:23 p.m.

REPORTED BY: MOLLY A. BENOIST
Certified Shorthand Reporter
CSR #1722

* * *

[13] male while the tape recorder was running and after the tape recorder quit running, if they turned it off, until you left. Just explain what happened, what you said.

A Okay. I was on the main stairwell at the hospital. I had just taken Dr. Braz over to the medical school wing for a faculty meeting, and I met Dr. Blake on the main stairwell, and he asked me what I was doing, what my career plans were we, so we talked about that for a minute. And then he asked me where I was going, I said over to the Clinical Sciences Building to the urology offices, and he said that he would walk with me.

So we started walking down the long walkway into the Clinical Sciences Building, and he mentioned to me that he had a urologic problem and he started telling me about a lesion that he had on his penis. And I said – suggested that he needed to go have that checked out and that we had an attending who had an interest in urologic oncology that would be happy to see him. He said "No, no, I don't want anybody to know about this. I don't – I don't want to go see anybody. I'm not going to go see the doctor about

that." And after that he asked me if I would examine him, and I said that I would.

* * *

No. 07-577

FILED
NOV 30 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
# Supreme Court of the United States

ROGER BLAKE, M.D.,
*Petitioner*,

v.

THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER, DR. DANIEL JONES, IN HIS OFFICIAL CAPACITY AS CHANCELLOR OF THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER, JAMES ROY KLUMB, ED BLAKESLEE, THOMAS W. COLBERT, DR. RICHARD A. CROFTS, DR. L. STACY DAVIDSON, JR., DR. D. E. MAGEE, JR., DR. BETTYE HENDERSON NEELY, VIRGINIA SHANTEAU NEWTON, BOB OWENS, AUBREY PATTERSON, ROBIN ROBINSON, SCOTT ROSS, AMY WHITTEN, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING AND PAUL TRUSSELL, INDIVIDUALLY AND AS DIRECTOR OF HUMAN RESOURCES OF THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

JOHN T. KITCHENS
*Counsel of Record*
TOM HUNT COLE
FORMAN PERRY WATKINS
KRUTZ & TARDY LLP
200 South Lamar Street
Suite 100
Jackson, Mississippi 39201
(601) 960-8600
*Attorneys for the Respondents*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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IN THE

# Supreme Court of the United States

No. 07-577

ROGER BLAKE, M.D.,

*Petitioner,*

v.

THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER, DR. DANIEL JONES, IN HIS OFFICIAL CAPACITY AS CHANCELLOR OF THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER, JAMES ROY KLUMB, ED BLAKESLEE, THOMAS W. COLBERT, DR. RICHARD A. CROFTS, DR. L. STACY DAVIDSON, JR., DR. D. E. MAGEE, JR., DR. BETTYE HENDERSON NEELY, VIRGINIA SHANTEAU NEWTON, BOB OWENS, AUBREY PATTERSON, ROBIN ROBINSON, SCOTT ROSS, AMY WHITTEN, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING AND PAUL TRUSSELL, INDIVIDUALLY AND AS DIRECTOR OF HUMAN RESOURCES OF THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER,

*Respondents,*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

## INTRODUCTION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the unpublished decision of the United States

Court of Appeals for the Fifth Circuit, appearing at App. 1-4. That decision affirmed summary judgment in favor of Respondents in an unpublished opinion of the United States District Court for the Southern District of Mississippi, appearing at App. 5-38. No motion for rehearing or rehearing en banc was filed.

Respondents submit that the academic question now asserted by Petitioner was not squarely presented to the lower courts and had no material bearing on the outcome of the decisions below. A review of the alleged *per se* rule against the admission of polygraph evidence to bolster or impeach a witness would be particularly inappropriate in the undisputed facts of this civil, procedural due process case. Moreover, contrary to the suggestion in the question presented, the court of appeals did not conduct a "harmless error" analysis and did not find **any** error in the district court's evidentiary ruling. Instead, the Fifth Circuit held that no abuse of discretion or denial of any substantive right of Petitioner had occurred.

## STATEMENT OF THE CASE

In this §1983 procedural due process employment case, the Petitioner failed to invoke the plenary post termination process afforded by a faculty grievance procedure, a failure which was fatal to such a claim. The material facts are set forth in detail in the district court's opinion. App. 6. Petitioner, a male, non-tenured assistant professor and staff surgeon, had a one year employment contract with Respondent, University Mississippi Medical Center (UMMC).[1] The contract provided, inter alia, that the

[1] Respondents, defendants below, included UMMC, an arm or agency of the state, state officials sued in their official

Petitioner could be terminated for "contumacious conduct." Petitioner engaged in sexual conduct involving a female UMMC resident physician on September 30, 2004.[2] App. 3, 9. After the resident reported the incident, the Petitioner was informed of the allegations against him on October 1, 2004. App. 3, 9. The Petitioner was then suspended with pay and notified in writing of his right to a hearing, a right the petitioner waived. App. 3, 9, 25.

The Petitioner then met with the UMMC Human Resources Director on October 4, 2004 to discuss the allegations and gave a detailed statement regarding his version of events. App. 3, 9, 25. As found by the district court, "during this meeting, Blake was informed of the allegations against him, informed of who made the allegations, and given an opportunity to convey his rendition of events." App. 24. While varying slightly in certain details, Petitioner's recorded statement coincided with the female UMMC resident's statement and confirmed the basic circumstances regarding this inappropriate examination. In addition, as part of a full investigation by the UMMC Human Resource Department and pursuant to UMMC policy, the resident and Petitioner were both given polygraph examinations. App. 3, 9-10.

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capacities, and state officials, such as the UMMC Human Resources Director, sued in their individual capacities. Putting aside the obvious Eleventh Amendment considerations, for purposes of this brief, they will be referred to jointly as "UMMC."

[2] It is undisputed that the Petitioner, an assistant professor and faculty surgeon, had a female resident inspect his penis inside his personal office, without gloves, and without anyone else present. Due to the nature of the examination and because the resident saw nothing of medical concern, the resident, as the district court pointed out, felt "duped" into examining Petitioner's penis. App. 9.

During the course of investigations, the Petitioner attempted to negotiate his resignation, App. 3, 10-12. Following all procedural requirements and its internal policies, App. 21-29, UMMC ultimately deemed the actions of Petitioner to be unprofessional conduct warranting termination. App. 3, 12. UMMC sent Petitioner a letter on December 10, 2004 advising him of the decision and notifying him of his right to file a grievance with a copy of the grievance procedure. App. 3, 12. As found by the lower courts, the Petitioner opted not to take advantage of the procedure and, instead, filed a §1983 lawsuit against Respondents in the district court, alleging a violation of procedural and substantive due process and a state law breach of contract claim. App. 3.

After full discovery, UMMC filed a comprehensive motion for summary judgment for all defendants along with certain other motions for relief. App. 7. Petitioner responded with additional motions, some evidentiary in nature, App. 7, as well as a response to UMMC's motion for summary judgment. The district court, on Respondents' motions for summary judgment, held in pertinent part that the procedures surrounding Petitioner's employment termination were constitutionally sufficient; that Petitioner was advised of his right to a hearing before an Executive Committee; that he was told of the reason for his proposed termination "in sufficient detail to enable him to show any errors in the allegation of sexual misconduct;" and was advised that the particular female resident had made the allegation. App. 22-25. Moreover, the district court held that after termination, Petitioner "was offered the opportunity to avail himself of the standard grievance procedure offered by UMMC, but waived that right by failing to take advantage of the procedure." App. 27. The Petitioner

"never requested a formal hearing. This failure on Blake's part does nothing to diminish the fact that UMMC complied with procedural due process by making such available to him." App. 27.[3]

The Petitioner had also moved to strike the results of both the resident's polygraph examination and his own exam, which were also attached as a part of the Respondents' evidentiary showing of deposition testimony, affidavits, and documentary exhibits. In this regard, the district court held that "Blake provides little argument in support of these prayers for relief, stating only that they are 'incompetent evidence' and that they are 'inadmissible polygraph examination results.'" App. 17-18. Such challenges must be based on the familiar *Daubert* standards, *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993), and Petitioner's motion to strike "made no arguments based on the factors set forth in *Daubert*." App. 18.

On appeal, the Fifth Circuit affirmed the grant of summary judgment in favor of Respondents, observing that "based on our review of the record, and essentially for the reasons stated in the district court opinion, summary judgment was proper." App. 5. With respect to the district court's denial of the motion to strike, the court of appeals adopted the reasoning of the district court by reference and held that the district court's refusal to strike the polygraph results was not an abuse of discretion, App. 4., the standard of review for evidentiary rulings.

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[3] Although no fundamental substantive constitutional right was actually implicated, the district court also dismissed the purported substantive due process claim, stating that the investigation and termination process was reasonable and rationally related to a legitimate government interest. App. 30-31.

## REASONS WHY THE PETITION SHOULD BE DENIED

The Petition fails to demonstrate any of the factors warranting certiorari review. As threshold matter, a decision by this Court on the admissibility of polygraphs would not be outcome determinative in the case at hand since the evidentiary ruling to admit the polygraphs played no material role in the procedural due process decision below. Instead, the Petitioner's due process claim turned on the undisputed fact that he received full notice of the allegations and an opportunity to be heard, but chose not to invoke this process. As a similarly prefatory bar to certiorari, the question presented should not be addressed in the case at hand since the polygraph results were neither admitted for the truth of their assertions nor reviewed for harmless error. Substantively, there is no genuine conflict warranting review on what is inherently a case-by-case issue properly determined under general *Daubert* standards and reviewed for abuse of discretion. In light of this, the majority of Circuit Courts of Appeal have abandoned a *per se* rule against polygraph admission, and the few courts currently giving lip service to a *per se* rule have allowed polygraph evidence for purposes other than to bolster or attack the credibility of a witness. In the instant case, the polygraph was used only as an initial investigative tool pursuant to standard hospital policy and procedure, and the results of the polygraph examination demonstrated that UMMC conducted a full and complete initial investigation of the incident.

## I. THE EVIDENTIARY RULING PLAYED NO MATERIAL PART IN THE OUTCOME OF PETITIONER'S PROCEDURAL DUE PROCESS CLAIM.

The Fifth Circuit's decision, and the district court decision it affirms, are particularly inappropriate springboards for the Petition's request that this Court academically parse the Circuits on various evidentiary rulings concerning polygraph exams. Here, the district court's refusal to strike the results of the polygraph exams given the male surgeon professor and the female resident—submitted in the case along with numerous affidavits, deposition testimony, and documents—had nothing whatsoever to do with the outcome of Petitioner's procedural due process claim on the merits. As found by the district court, the Petitioner was given ample notice of the allegations against him and an opportunity to be heard under constitutionally sufficient procedures—but Petitioner opted not to avail himself of that opportunity. App. 25-29. Accordingly, the fact that the polygraph results were not stricken was not material in any way to the eminently correct outcome on the procedures that existed and were afforded to Petitioner. As the court of appeals correctly held, there was no abuse of discretion in the evidentiary ruling, and the ruling did not affect a substantive right of a party.[4] The polygraph results played no part in whether Petitioner received procedural due process. It is accordingly submitted that if the admission or exclusion of the polygraph results here is divorced from, and cannot arguably change, the

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[4] The comment to F.R.Ev. Rule 103(a), cited by the Fifth Circuit, succinctly states that "[r]ulings on evidence cannot be assigned as error unless (1) a substantial right is affected . . . ."

outcome of the procedural due process challenge, then this case on its facts is not a good prop for this Court to needlessly wade into discretionary evidentiary thickets.

The Petitioner's current desire for an abstract debate on the admissibility of polygraph examinations is totally unhitched from the material facts of this case and affords no basis for review by this Court. This is particularly true in light of the fact that in the district court, Petitioner made only conclusory statements requesting the alleged inadmissibility of polygraph results, without any detailed presentation or showing under *Daubert* standards. App. 17-18.

## II. THE QUESTION PRESENTED CANNOT BE ADDRESSED IN THIS CASE.

The question presented by Petitioner is not asked "in relation to the circumstances of the case" as envisioned by Supreme Court Rule 14. Notwithstanding its incorrect depiction of any split in authority,[5] the question presented cannot be answered under the facts of this case. The polygraph results were not admitted in the district court for the "truth of their assertions." Instead, the polygraph exams merely demonstrated one initial step in the investigative process of a government hospital employee dispute. App. 25. Furthermore, contrary to

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[5] The majority of Circuit Courts of Appeal permit judicial discretion for evidentiary rulings on polygraph admissibility, with the District of Columbia failing to revisit the issue since this Court's decision in *Daubert* and the Fourth Circuit being the only court of appeal to maintaining a *per se* rule against admitting polygraph examinations to bolster or attack witness credibility.

the suggestion in the Petition, the Fifth Circuit never addressed the question of whether the evidentiary rulings below amounted to "harmless error," because it found no error in the District Court's admission of the polygraphs. App. 4.

## III. THERE IS NO TRUE CONFLICT WARRANTING CERTIORARI REVIEW AND THE FIFTH CIRCUIT PROPERLY REVIEWED THE EVIDENTIARY RULING FOR ABUSE OF DISCRETION.

There is no genuine conflict in the Circuit Courts of Appeal that would warrant this Court's exercise of certiorari jurisdiction. The Petition overstates the variance among Courts of Appeal regarding polygraph admissibility and misconstrues its applicability to this case. Such evidentiary rulings inherently depend on case-by-case determinations. The majority of courts appropriately permit judicial discretion in evidentiary rulings regarding polygraph admissibility, as the Fifth Circuit correctly did here, with varying results on admission or exclusion largely attributable to differing facts. *U.S. v. Lynn*, 856 F.2d 430 (1st Cir. 1988) (Ruled abuse of discretion in not allowing cross-examination on polygraph); *U.S. v. Lee*, 315 F.3d 206, 214 (3rd Cir. 2003) (stating that "this Court has not adopted a *per se* exclusionary rule regarding polygraph evidence"); *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000) (citing its previous decision in *U.S. v. Posado*, 57 F.3d 428 (5th Cir. 1995), the Fifth Circuit reiterated the fact that it no longer follows a *per se* rule against polygraph admission); *U.S. v. Lea*, 249 F.3d 632, 638 (7th Cir. 2001) (District Courts allowed great deal of discretion in admitting polygraph); *Rupe v. Wood*, 93 F.3d 1434, 1441 (9th Cir. 1996) (not admitting polygraph at

penalty phase of murder trial violated due process rights); *U.S. v. Henderson*, 409 F.3d 1293, 1302-03 (11th Cir. 2005).

Petitioner relies heavily on the Fourth Circuit's *per se* rule against admission of polygraph exams to bolster or impeach the credibility of a witness and disregards the fact that polygraphs are admissible for other purposes. In a case analogous to this one, the Fourth Circuit held in an unpublished opinion that "the polygraph evidence was introduced not to bolster Walters' credibility, or attack Miller's, but to rebut Miller's claim that the County acted arbitrarily in suspending him. Therefore, the polygraph result was admissible." *Miller v. Drennon,* 1992 WL 137578, *5 (4th Cir. 1992) (See also *U.S. v. A & S Council Oil Co.*, 947 F.2d 1128 (4th Cir. 1991) (holding polygraph admissible as an attack on witness opinion not defendant's credibility). In addition to admitting polygraph evidence for certain purposes, the Fourth Circuit, in the case cited by Petitioner, recently acknowledged the change in the law regarding polygraph admission since this Court's decision in *Daubert* and hinted that when the issue presents itself to the en banc court, it will likely abandon the *per se* rule. *U.S. v. Marvel Johnson Prince-Oyibo*, 320 F.3d 494 (4th Cir. 2003) (holding that only the en banc Court has authority to consider whether a *per se* ban is viable after *Daubert*.)

Petitioner also asserts the military courts and the District of Columbia maintain a *per se* rule against the admission of polygraphs. However, courts-martial derive power from a different Article of the Constitution, deal with military offenses, and use different court and evidentiary rules than federal courts of appeal. Therefore, Petitioner's reliance on the mili-

tary's *per se* rule against polygraph admission as conflicting with federal circuits is misplaced. Likewise, the relatively small number of polygraph-related decisions from the District of Columbia, including the case cited by Petitioner,[6] do not conflict with an approach to evidentiary rulings on polygraph examinations that permits judicial discretion.

Moreover, any split in authority regarding whether and under what circumstance polygraphs are admissible does not rise to the level of an intolerable conflict warranting review but amounts to a permissible variance inherent in the determination of evidentiary matters. This Court has already recognized the existence of some discrepancy regarding polygraphs and stated, "Individual jurisdictions [ . . . . ] may reasonably reach differing conclusions as to whether polygraph evidence should be admitted." *U.S. v. Sheffer*, 523 U.S. 303, 312 (1998) (holding the military's *per se* rule against admitting polygraphs is not unconstitutional but with 5 out of 9 Justices disfavoring a *per se* rule against polygraph admissibility). Thus, any variance in the decisions of lower courts is tolerable and does not warrant the Court's plenary review.

## IV. THE PETITION CONTAINS FACTUAL ERRORS.

Despite Petitioner's assertions, the courts below never held that the **polygraph** "satisfied the notice

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[6] *U.S. v. Graham*, 83 F.3d 1466, 1474 (D.C. Cir. 1996) ("We are not persuaded that the polygraph results would have significantly aided the impeachment. As the district court found, Forgy, 'had already admitted to the deceptions in other contexts in the course of direct examination, and there is a limit to the number of deceptions which operate for impeachment.")

and hearing requirements" of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), Pet. 2, and never held that the polygraph "afforded sufficient basis for the Court to grant summary judgment against the doctor." Pet. 2. Instead, the district court, in a decision adopted by the Fifth Circuit, found that in the procedural due process context of this case, the polygraph examination merely provided Petitioner one of several opportunities to be heard on the allegations against him. App. 25.

In addition to inaccurately portraying the decisions below, the Petition is less than candid with respect to the material facts. First, the Petition states that the Petitioner never learned the conduct that gave rise to his termination. Pet. 3. As found by the district court, the Petitioner was informed of the allegations against him on October 1, 2004, App. 3, had a meeting with human resources regarding his conduct on October 4, 2004, App.3, and was then given a polygraph regarding the conduct in question, App. 3, 9. Petitioner's attorney was also in negotiations with UMMC in an attempt to arrange for Petitioner's resignation and clear his file of the conduct. App. 3, 10-12. Petitioner was finally given a termination letter on December 10, 2004, which again referenced the conduct that led to his termination. App. 3, 12, 26.

Second, the Petition asserts that UMMC refused to afford Petitioner a due process hearing. Pet. 3. This is directly contrary to the detailed conclusion of the district court. Instead, it was Petitioner that refused a hearing offered him on October 1, 2004 to contest his paid, administrative suspension. App. 3, 24. Petitioner also failed to avail himself to the UMMC grievance procedure, which stated Petitioner was

entitled to a hearing and could call witnesses on his behalf. App. 3, 26-29. Petitioner's "only confrontation was with the polygraph examiner," Pet. 4, because he chose not to avail himself to his right to the additional hearings offered by UMMC. App. 25.

Third, the Petition inaccurately states the reason the polygraph examination results were admitted and the role the polygraphs played in the decisions below. Petitioner states the polygraph was admitted in the District Court to establish contested issues of fact, Pet. 2, and "for the truth of its assertions," Pet. 3; however, as discussed above at pages 7 and 8, the results of the polygraph played no material part in the district courts decision, and the results were mentioned by the court only to show one step in the UMMC's investigative process. App. 25, 30-31. Petitioner misstates the Courts' reliance on the polygraph results as a "confession" and alleges the "polygraph exam stood in place of a trial." To reiterate, neither the Fifth Circuit nor the District Court relied on the ***results*** of the polygraph examinations in deciding the fate of Petitioner's procedural due process or other state law claims. Although the district court stated the polygraph examiner's findings in its recitation of the background facts, App. 10, the Court did not use the results as a factor in summary judgment. Instead, the district court merely considered the polygraph examination process itself as providing Petitioner yet another opportunity to be heard regarding the allegations against him. App. 25.

Finally, Petitioner suggests his polygraph objections were properly preserved in his motions to strike filed in the district court. Pet. 2. As pointed out by the district court, however, the Petitioner failed to

make specific objections to the polygraph results and instead merely moved to strike the same as "not competent" and "inadmissible." App. 17-18. Petitioner also suggests that the Court of Appeals reviewed admission of the polygraph for "harmless error," Pet. 3, when the Fifth Circuit did not find any error and actually held such admission "was *not* an abuse of discretion." App. 4. (emphasis added.)

## V. REVIEW IS UNNECESSARY BECAUSE ANY REMAINING DISAGREEMENT IN THE CIRCUITS IS LIKELY TO RESOLVE ITSELF WITHOUT THE NEED FOR THE INTERVENTION OF THIS COURT.

As discussed supra, the question presented does not align with the facts at hand, making this case an improper vehicle to address in general the issue of polygraph admissibility. Moreover, even if this Court were inclined to do so, such review is unnecessary under the circumstances. Given the Fourth Circuit's comments in *U.S. v. Marvel Johnson Prince-Oyibo*, 320 F.3d 494 (4th Cir. 2003) and this Court's holding in *U.S. v. Sheffer*, 523 U.S. 363 (1998), any remaining dissension among the Circuit Courts of Appeal will likely resolve itself.[7] Accordingly, there is no current need for intervention by this Court.

Additionally, emerging advancements in the field of neuroscience offer new developments for "lie

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[7] As discussed *infra* on page 10, the Fourth Circuit hinted that it may abandon the per se rule against polygraph admission in a case before the en banc court, *Prince-Oyibo*, 320 F.3d 494, and as this Court stated in *Sheffer*, "Individual jurisdictions [ . . . . ] may reasonably reach differing conclusions as to whether polygraph evidence should be admitted." 523 U.S. at 312.

detection" that will inevitably affect the legal system. As pointed out in the Petition, other neuroscience devices, such as functional magnetic resonance imaging are changing the dynamics of an area once primarily occupied by the polygraph. Pet. 4. A premature decision from this Court regarding the admissibility of lie detectors may have far-reaching results for scientific developments that have yet to be fully tested and critiqued.

## CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN T. KITCHENS
*Counsel of Record*
TOM HUNT COLE
FORMAN PERRY WATKINS
KRUTZ & TARDY LLP
200 South Lamar Street
Suite 100
Jackson, Mississippi 39201
(601) 960-8600

*Attorneys for the Respondents*